No. 21,127

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

HORACE MEYER, et al.,
Appellees.

Appeal from the United States District Court for the Northern District of California, Northern Division

BRIEF FOR HORACE MEYER, APPELLEE

C. RAY ROBINSON,
19th and N Street Building,
Merced, California 95340,

BLEDSOE, SMITH, CATHCART,
JOHNSON & ROGERS,
650 California Street,
San Francisco, California 94108,
Attorneys for Appellee Horace Meyer.

ROBERT A. SELIGSON,
650 California Street,
San Francisco, California 94108,
Of Counsel.

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STATEMENT OF THE CASE

This is an appeal by the plaintiff, United States of America, from the judgment entered in the above-entitled action on May 10, 1966, dismissing the cause of action and striking from the court's records the Complaint in Condemnation and the Declaration of Taking and the Order for Delivery of Possession. (R. 165-166) The judgment is based upon findings of fact and conclusions of law (R. 156-162) by which the court found that the United States of America had willfully and without substantial justification or adequate excuse refused to make discovery within the

meaning of Rule 37 of the Federal Rules of Civil Procedure and that the United States of America had willfully and without substantial justification or adequate excuse caused witnesses to disobey subpoenas duces tecum within the meaning of Rule 45 of the Federal Rules of Civil Procedure. (R. 156-162) The findings of fact further recite that the United States of America, through its attorney, had stated that any order compelling answers to the questions propounded on oral deposition and any order to obey the subpoenas duces tecum would be refused by the witnesses on the instruction of the United States of America; and the court held the United States of America in contempt of court and, under the provisions of Rules 37 and 45 of the Federal Rules of Civil Procedure and in its inherent power to punish contempt of court, dismissed the Complaint in Condemnation and the Declaration of Taking and set aside its Order for Delivery of Possession previously filed in the action.

The case involves the important questions of the scope of discovery in federal condemnation cases and whether or not the United States of America may disobey orders of discovery in such cases without being subject to the sanctions set forth in Rule 37 of the Federal Rules of Civil Procedure.

STATEMENT OF FACTS

The United States of America filed its Complaint in Condemnation in the instant action, together with a Declaration of Taking, on January 15, 1964. (R.

1-11) By its complaint, the United States sought to acquire two designated parcels of land, totaling 364.82 acres located in the County of Mariposa, State of California, owned by Horace Meyer, for use in connection with the Yosemite National Park. (R. 2) An order for delivery of possession was entered on the same day. (R. 12)

On September 30, 1964, defendant, Horace Meyer, noticed the depositions of Robert Wilson, James Hopper, and Charles Sortor for December 19, 1964. (R. 20-22) These three individuals had made appraisals of the defendant's property at the request of the National Park Service. On October 13, 1964, the United States moved for a protective order, asking that each of the deponents not be interrogated as to his opinion of the value of the subject property, his opinion of the highest and best use of the subject property, any matter of opinion or conclusions reached upon a consideration of facts ascertained by the deponent, upon or about any written report that the deponent may have submitted to the National Park Service or other agency of the United States Government, as to any matter presumably within the knowledge of the defendant or for the purpose of cross-examination in the event that the deponent testified as a witness at the trial of the action. (R. 29-36) The motion was fully briefed by the parties (R. 44-61; 69-90; 91-103); and on October 27, 1965, the District Court filed its memorandum and order denying the United States' motion for a protective order and ruling that the defendant was entitled to the discovery

which the United States had sought to block. (R. 104-113. The District Court's opinion may also be found at 38 F.R.D. 411 (1965))

The United States informed the District Court of its intention to appeal from the memorandum and order denying the United States' motion for a protective order; and on November 1, 1965, the District Court, at the request of the United States, amended its order to provide that it was the opinion of the court that if, in its discretion, the Court of Appeals were to permit an immediate appeal to be taken from the order, it would materially advance the ultimate termination of the litigation. (R. 114) On November 23, 1965, this Court denied the motion of the United States seeking leave to appeal from an interlocutory order under the authority of *United States v. Woodbury,* 263 F.2d 784 (9th Cir., 1959). (R. 115)

The defendant thereupon renoticed the depositions of Robert Wilson, James Hopper, and Charles Sortor for December 27, 1965. (R. 116-118) Subpoenas were issued for each of the witnesses, commanding them to bring "all records, maps, photographs, data on comparable sales, reports on water supply or the lack thereof, a complete list of the settlements and payments made by the United States for Foresta lots or property, together with a list of Foresta lots, if any, which have not been acquired, subdivision reports, utility company reports, soil or agricultural reports, books, papers, documents, and tangible things which now are or may be in your possession, and which are related to the above-entitled cause." These subpoenas

contained the same language as that contained in the earlier subpoenas issued for the depositions of the witnesses which had been noticed prior to the motion for a protective order filed by the United States. The United States requested a continuance of the depositions and then on January 10, 1966, when the depositions were taken, without first seeking to quash the subpoenas, refused to permit the witnesses to turn over the great bulk of the records and papers which had been subpoenaed. The United States also refused to permit the witnesses to testify concerning the matters which the court had already ruled were subject to discovery in its Memorandum and Order denying the United States' motion for a protective order.

As stated by the United States in its opening brief, each deposition followed a similar pattern. None of the witnesses brought with him the records which had been subpoenaed. Each witness had turned his files over to the Assistant United States Attorney who, with the exception of a few innocuous maps and photographs, refused to turn over any of the material which had been subpoenaed.

The first deposition was Robert B. Wilson, an independent real estate appraiser. He initially testified that he first became familiar with the condemned property in the middle of 1963. (W. Dep. 3)[1] However, he later testified that he was employed by the National Park Service on December 27, 1962 (W. Dep.

[1]For the purposes of this brief, "Dep." refers to the transcripts of the depositions, while "W" indicates Wilson, "S" indicates Sortor, and "H" indicates Hopper.

12-14), and he then acknowledged that he first became interested in the property in August, 1962. (W. Dep. 24) Mr. Wilson received a letter dated August 30, 1962, from the National Park Service; but the United States refused to produce this letter on the ground that it contained material which Mr. Wilson had subsequently placed on it. (W. Dep. 17) The United States also refused to produce the documents pertaining to his employment and payment for services. (W. Dep. 13) The United States next refused to produce a map of the defendant's property, which was contained in Mr. Wilson's files, on the ground that it contained pencil notations reflecting field notes and interviews. (W. Dep. 19-21) It refused to produce other maps of the defendant's property on the ground that they contained penciled notations of opinions formulated by the witness (W. Dep. 25-26) and refused to permit Mr. Wilson to testify as to what other property he had been working on in the area. (W. Dep. 27) It refused to permit him to state the dates of other appraisals that he had made with reference to the subject property (W. Dep. 27) and refused to allow the witness to state where the other property was located with reference to the Meyer property. (W. Dep. 28) Mr. Wilson was not permitted by the United States to state the amount of time that he had put in on the appraisal of this other property or whether he had used the property as a comparable in arriving at his opinion on the Meyer property. (W. Dep. 28) He was not permitted to give his opinion as to the fair market value of that property, whether any severance damage

was involved therein, or even to give the general nature and character of that property in relationship to the Meyer property insofar as comparability was concerned. (W. Dep. 28-29) When he was asked what compensation he had received for the other appraisals, Mr. Wilson said that he didn't recall. (W. Dep. 29)

The United States refused to permit Mr. Wilson to produce his letter of transmittal and report concerning the Meyer property. (W. Dep. 31-32) Mr. Wilson stated that the report contained a list of comparables, but the United States refused to permit him to testify how many comparables were contained in the report. (W. Dep. 32) The Government also refused to permit Mr. Wilson to testify how many of the comparables he had considered in arriving at his opinion of the value of the Meyer property. (W. Dep. 33) Mr. Wilson testified that he first went out to the McCauley ranch property, one of the defendant's parcels sought to be condemned by the United States, in the summer of 1962 (W. Dep. 38), but the United States would not let him say when he was next on the property, although the witness did testify that he was on the property approximately six times. (W. Dep. 39-40) He was not permitted to testify who accompanied him when he next went on the defendant's property. (W. Dep. 40) He was not permitted to give his opinion of the fair market value of the defendant's property (W. Dep. 41-43), nor was he permitted to testify whether, in formulating his opinion of the fair market value of the property, he took into consideration any sales at Wawona. (W. Dep. 44) Indeed, he was instructed

by the United States not to state any of the parcels of sale that he took into consideration in formulating his opinion of the value of the condemned property. (W. Dep. 44) The United States wouldn't even permit him to describe the nature and character of the condemned property at Big Meadow (W. Dep. 44) and wouldn't allow the witness to state what he concluded was the highest and best use of any or all of the defendant's property. (W. Dep. 45)

The United States wouldn't allow Mr. Wilson to state his opinion of the fair market value for either the Big Meadow property or the McCauley 40 acres (W. Dep. 46), nor would it permit him to answer whether he had any information which would cause him to vary his conclusion of the value of these properties. (W. Dep. 47) He was not permitted to give a full answer concerning the compensation he had received from the United States (W. Dep. 50), nor was he allowed to answer what he had found out about the water rights on Big Meadow or McCauley at the Assessor's Office in Mariposa. (W. Dep. 50) The Government refused to let him answer any questions concerning comparable sales (W. Dep. 52-53) and likewise wouldn't let him answer any questions concerning his evaluation of the condemned property. (W. Dep. 53-54) It refused to permit him to answer with whom he had consulted insofar as his evaluation of the property was concerned and wouldn't permit him to testify whether he had discussed the matter with Mr. Hopper, one of the Government's other appraisers. (W. Dep. 53-54) It refused to permit him to answer whether he

vas familiar with particular sales in the area specified by defense counsel. (W. Dep. 55-56) Finally, Mr. Wilson testified that he was familiar with the District Court's decision which had previously been rendered in the case, but still refused to produce or to answer the questions solely upon the advice, instruction, and direction of the Assistant United States Attorney. (W. Dep. 55)

Charles H. Sortor, a consulting engineer, was the next witness. He testified that he started work in connection with his evaluation of the defendant's property for the National Park Service in September, 1962. (S. Dep. 6) He estimated the market value of the defendant's property as of October 4, 1962. (S. Dep. 8) He went on the defendant's property about October 10, 1962. (S. Dep. 10) As in the case of Mr. Wilson, Mr. Sortor refused to turn over the subpoenaed materials (S. Dep. 3) and was instructed not to give any information concerning comparable sales (S. Dep. 11) or the fair market value of the defendant's property. (S. Dep. 11-13)

James A. Hopper, a licensed real estate broker and independent real estate appraiser, was the final witness. He, too, didn't bring any of the papers which had been subpoenaed but simply turned them over to the United States Attorney, who refused to produce the materials. (H. Dep. 3-10) His first appraisal of the Meyer property was on January 19, 1952; and he prepared and filed a written report on that appraisal. (H. Dep. 13) His next appraisal and report was more than ten years later, on August 21, 1962. (H. Dep. 13)

He has made no further appraisal of the Meyer property since August 21, 1962. (H. Dep. 31) The United States refused to deliver either of the appraisals (H. Dep. 14) and refused to permit Mr. Hopper to answer any questions concerning either of his appraisals of the defendant's property. (H. Dep. 20-21) It directed Mr. Hopper not to answer whether he had included the various sales of the Foresta parcels, which bordered on the defendant's property, in his list of comparables (H. Dep. 24-25); and it refused to allow Mr. Hopper to answer any questions relating to other condemnation cases in which he had testified for the United States. (H. Dep. 28)

Following these abortive depositions, the defendant moved for an order compelling the witnesses to answer all of the questions which they had refused to answer or which plaintiff's counsel had instructed them not to answer and also moved for an order holding the witnesses in contempt for failure to obey the subpoenas duces tecum served upon them to compel them to produce the items listed in the subpoenas. (R. 122-134) At a hearing held on the defendant's motions on April 18, 1966, the Assistant United States Attorney stipulated that all the procedural steps had been properly taken, stated that the United States took full responsibility for the failure to produce the subpoenaed records and papers and the refusal to answer the questions propounded at the depositions, and acknowledged that the court might, as one of its consequences for failure to comply with the court's previous order and decision, strike the pleadings or

parts thereof or dismiss the action or proceeding or any part thereof. Counsel representing the United States further stated that the United States felt that the court was wrong, that it would not comply with an order compelling the witnesses to answer the questions propounded at the depositions and that the United States would take an appeal in the case. Mr. Burbank stated to the court:

> "The existing order denies the Government's motion for a protective order, and it would seem to me under the circumstances, in the light of the motion filed by Mr. Robinson, counsel for the defendant, that if the court feels the Government's position in this regard is in error, that it would order the witnesses to answer the questions propounded at the taking of the depositions insofar as they were dealt with in the court's earlier memorandum and with rare exceptions I would suggest that the court's memorandum adequately covered that matter.
>
> "Now, on behalf of the witnesses, I would have to state to the court that the witnesses would continue, with all respect, at the request of and the advice of the United States attorney, to decline to answer those questions."

The court thereupon dismissed the action, pursuant to the findings of fact and conclusions of law filed on May 10, 1965; and this appeal has ensued.

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT THE DEFENDANT WAS ENTITLED TO DISCOVERY OF THE OPINIONS OF THE PLAINTIFF'S APPRAISERS, THE FACTS UPON WHICH THEY BASED THEIR OPINIONS AND THE REPORTS WHICH THE APPRAISERS SUBMITTED TO THE NATIONAL PARK SERVICE; AND THAT THE UNITED STATES HAD WILLFULLY FAILED TO COMPLY WITH THE COURT'S ORDER.

The instant case presents the question of the scope of discovery in federal condemnation cases. Throughout these proceedings, the United States has taken the position that a landowner whose property it seeks to condemn is not entitled to any meaningful discovery. Prior to the depositions of the three appraisers, the United States sought a protective order. As stated by Judge Halbert in his opinion denying the motion for a protective order:

> "The Government requests an order prohibiting inquiry into the following: (1) the appraiser's opinion of the value of the property; (2) the appraiser's opinion of the highest and best use of the property; (3) any matter of opinion, or conclusion reached upon consideration of facts ascertained by the appraiser; (4) any written reports that the appraiser may have submitted to any agency of the United States Government; and (5) any matter presumably within the knowledge of the defendants. In addition, the Government seeks immunity for their appraisers from examination for the purpose of cross-examination at the trial." (38 F. R. D. 411 at 412 (1965))

Following this Court's order denying the United States' motion seeking leave for an interlocutory appeal from the District Court's order, the defendant

promptly re-noticed the depositions of the three appraisers and subpoenaed their records in language which was identical to the language contained in the original subpoenas served upon the appraisers. The United States did not file any motion to quash the subpoenas. Instead, it instructed the appraisers to turn over their records and files to the United States Attorney; and it refused to produce any of the records and reports, apart from a few innocuous maps and photographs, and it instructed the witnesses not to answer any of the questions which the District Court had already ruled were matters of proper discovery. Despite the District Court's previous order, the United States refused to permit the appraisers to state any opinions or the facts upon which they based their opinions. The Government refused to allow the appraisers to disclose any information concerning comparable sales or other property which the appraisers had taken into consideration in formulating their evaluation of the defendant's property. The transcripts of the depositions show a complete refusal on the part of the United States to comply with the prior ruling of the District Court.

In *Hickman v. Taylor,* 329 U.S. 495, 501, 507 (1947), the United States Supreme Court stated:

> "The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations in the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving, issue-formulation, and fact-revelation were performed primarily and inadequately by the pleadings. In-

quiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial. . . .

"We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise."

The United States, in the position it has advanced in the instant case, seeks to turn back the clock. It seeks

a return to the days when the "game" element was found in trial preparation and trials were carried on in the dark. It seeks a special status for the Government in condemnation cases which is contrary to the position which the Government itself has taken in other kinds of litigation.

In *Greyhound Corp. v. Superior Court,* 56 Cal.2d 355, 376 (1961), Justice Peters, speaking for the California Supreme Court, commented concerning the California discovery laws, which had been adopted from the federal rules of discovery:

> "The new system, as was the federal system (Moore's Federal Practice, vol. 4, pp. 1014-1016), was intended to accomplish the following results: (1) to give greater assistance to the parties in ascertaining the truth and in checking and preventing perjury; (2) to provide an effective means of detecting and exposing false, fraudulent and sham claims and defenses; (3) to make available, in a simple, convenient and inexpensive way, facts which otherwise could not be proved except with great difficulty; (4) to educate the parties in advance of trial as to the real value of their claims and defenses, thereby encouraging settlements; (5) to expedite litigation; (6) to safeguard against surprise; (7) to prevent delay; (8) to simplify and narrow the issues; and, (9) to expedite and facilitate both preparation and trial."

Justice Peters further noted that each of these purposes was generally expressed in *Hickman v. Taylor, supra.*

The United States argues "here there is only a single issue, i.e., just compensation". (Appellant's Brief, p. 26) It further argues, "Since the issue ultimately turns largely on the weight to be given the opinions of the experts, the parties are entitled to, and do, show all the considerations upon which their conclusions are based." (Appellant's Brief, p. 26) This is precisely why full discovery should be allowed of the appraisers' opinions and all the facts and considerations upon which they based their opinions. Indeed, it is the heart of the District Court's decision denying the Government's motion for a protective order. The District Court stated:

> "The rationale behind the eminent domain power is that in certain circumstances public necessity must take precedence over individual property rights. (citation) The exercise of that power, however, carries with it the correlative duty to protect individual rights to the fullest possible extent. (citations) . . . There is nothing sacred about the rights of the Government in eminent domain proceedings. The Government ought to be as frank, fair and honest with its citizens as it *requires* its citizens to be with it. That fairness will be enhanced by full disclosure of all matters that will expedite trial or encourage out-of-court settlements. I am now persuaded that the true and proper rule is the one laid down by the Court in *United States v. 23.76 Acres of Land, etc.,* D. C., 32 F. R. D. 593, as follows:
>
> 'Where value is the basic, if not sole, issue in litigation, it is not unfair for either party to know in advance of trial what the other

> party intends to prove, what opinions his [opponent's] experts hold, the method by which those opinions were formulated, and the facts upon which they are based.' (32 F. R. D. at 597)" (38 F. R. D. 411 at 413, 415)

In *United States v. 23.76 Acres of Land, etc.*, 32 F. R. D. 593 (1963), the court held that owners of condemned land were entitled to discovery of the opinion of the Government's real estate appraiser and the facts considered by the appraiser in forming his ultimate opinion as to the value of the land. The court also held that the property owners were entitled to discovery of the Government expert's method of appraisal of the land. In reaching these holdings, the court noted that under state law, "full discovery as to expert witnesses is permitted in condemnation cases, and the results have been that the issues are sharpened and pointed, trial time is reduced, and settlements are encouraged." (32 F. R. D. 593 at 597) The court concluded by holding that where value is to be litigated through expert witnesses, the best way to avoid unfairness and secure "the just, speedy, and inexpensive determination of every action" is to make the expert data, opinion and material discoverable. See also *United States v. 62.50 Acres of Land, etc.*, 23 F. R. D. 287 (1959).

Since 1962, there has been full discovery of appraisers' opinions in condemnation cases brought in California state courts. In *Oceanside Union School Dist. v. Superior Court*, 58 Cal.2d 180 (1962), the California Supreme Court held that appraisers'

opinions were not privileged and were discoverable. The court stated:

> "The purpose of the condemnation action (out of which this proceeding has arisen) is to determine the fair market value of the property. Assumedly, petitioner believes that its appraisers have arrived at a fair market value. If public interest, as the words are used in section 1881, would suffer by disclosure of the fair market value of the condemned property, then the statute on privilege would have to fall before the constitutional requirements that no private property be taken without due process of law. (citations)" (58 Cal.2d 180 at 187)

In reaching this decision, the court relied upon *People ex rel. Dept. of Public Works v. Donovan,* 57 Cal.2d 346 (1962), where it was held that where the condemning authority had failed to call its own appraiser at the trial of a condemnation action, the defendant was entitled to call that appraiser as a witness and elicit from him not only the facts which he had determined, but also his opinion as to the value which he had transmitted to plaintiff's counsel. The real estate appraiser, who obtains his information by viewing the adversary's property, by recourse to public records of permitted land use, and from comparable sales, is not transmitting a client's "confidence". Thus, there cannot be any question of attorney-client privilege; and indeed, the United States has conceded that the attorney-client privilege is not involved herein.

In addition to the cases set forth above, the opinions of experts have been held to be discoverable in a num-

ber of federal cases. (*Sachs v. Aluminum Co. of America,* 167 F.2d 570 (6th Cir., 1948); *Bergstrom Paper Co. v. Continental Ins. Co. of City of N.Y.,* 7 F. R. D. 548 (1947); *Leding v. U. S. Rubber Co.,* 23 F. R. D. 220 (1959); *Broadway & Ninety-Sixth St. Realty Co. v. Loew's Inc.,* 21 F. R. D. 347 (1958); *Russo v. Merck & Co.,* 21 F. R. D. 237 (1957)) Indeed, the United States has obtained the opinion of experts in cases where it has taken a diametrically opposed position to the one which it takes in the case at bar. (*Seven-Up Bottling Co., Inc. v. United States,* 39 F. R. D. 1 (1966); *United States v. 38 Cases, More or Less, etc.,* 35 F. R. D. 357 (1964); *United States v. Nysco Laboratories, Inc.,* 26 F. R. D. 159 (1960)) In the *Seven-Up* case, the question of appropriate valuation of certain corporate assets under the provisions of the Internal Revenue Code was involved. The United States served notice to take the deposition of the corporation's expert witness, and the corporation objected. The court overruled the objection, stating:

> "The Government maintains that it must take this deposition so as to prepare itself to cross-examine the expert at the trial. They wish to question him as to his method of valuation, his basic assumptions, and his analysis as well as the weight which he gives to facts in the case. Plaintiff's position is that the witness has been employed by counsel and not by the plaintiff and from this argues that his testimony has an aspect of privilege. . . . The interests of the deposing party in gaining information for trial is weighed against the hardship which the other party will suffer in terms of expense and prejudice to his

> case. It would, though, appear that the underlying factor which causes the courts to treat expert testimony somewhat differently from testimony of other witnesses is that the party has an investment in the witness. Somehow it is believed that he has bought and paid for the witness and that the other party should not share in his property. We cannot accept this "oath helper" approach to discovery. It is inconsistent with our basic assumption that the trial is a search for truth and not a tactical contest which goes to either the richest or to the most resourceful litigant." (39 F. R. D. 1 at 2)

In the instant case, the United States has taken the position that the defendant was not entitled to take the deposition so as to prepare himself for cross-examination of the experts at the trial. The *Seven-Up* case not only demonstrates that the Government in the case at bar is taking an inconsistent position but also shows that the position advanced by the Government herein is wrong.

The United States has also claimed that the opinions of its experts are protected as work product. It is not clear how or why the opinions of the experts, as distinguished from their reports, might be considered to be work product. In *United States v. 38 Cases, More or Less, etc., supra,* the Government sought to condemn a drug on the ground that it had been mislabeled. It noticed the depositions of the defendant's expert witnesses; and the defendant objected on the ground that this would invade the defendant's work product. The court denied the defendant's motion for a protective order, holding:

> "[T]hat experts may provide evidence for a party does not, ipso facto, make them technical advisors to a lawyer and their advice and reports a part of his work product. (citation) . . . It is likely in this case that expert testimony will be available on both sides and the issues be defined in large measure through such testimony. If such testimony is to be understood by the trier of fact, it is essential that there be an orderly presentation of relevant facts at trial." (35 F. R. D. 357 at 361, 364)

The court held that since the witnesses would have evidence as to the substance of the issues involved in the case, they become a potential source for evoking facts; and their opinions should be discoverable.

The Government argues that the work product principle of *Hickman v. Taylor, supra,* should preclude discovery of the appraisers' opinions and records. Initially, we note that *Hickman* dealt with an attempt to discover the attorney's thought processes. The Supreme Court, in holding that a party is not entitled to obtain the files and mental impressions of adverse counsel, emphasized that this did not mean that the information which an attorney had secured from a witness was non-discoverable. Indeed, the court's opinion emphasizes the liberal treatment to be applied to the discovery rules; and Justice Jackson's concurring opinion, which has been relied upon by the United States herein, states:

> "It seems clear and long has been recognized that discovery should provide a party access to

> anything that is evidence in his case." (329 U.S. 495 at 515)

The Government argues that the function of the appraiser is similar to that of the attorney. We disagree. The appraiser is a person who will testify and give evidence upon which the trier of the fact will make its decision. The attorney has no such function. His function is to be an advocate—not a witness. Discovery will not prevent the appraiser from being "free to go about his way ascertaining the facts, investigating sales, interviewing parties to the sales or other persons in the vicinity, rejecting irrelevant facts, preparing his valuation theories, etc." (Appellant's Brief, p. 50) It will simply mean that the Government will not be able to hide the appraisers' opinions and the facts upon which they base their opinions in the dark and then spring them on the defendant landowner at trial. Full discovery of the experts' opinions and the facts upon which they base their opinions, including comparable sales, will bring this important testimony into the light of day in advance of trial, so that the search for truth will be enhanced and the chances of settlement greatly increased. It should also improve the quality of the appraisers' work and the thoroughness with which they prepare their reports.

As Professor Friedenthal in his outstanding article, "Discovery and Use of an Adverse Party's Expert Information", 14 Stanford L. Rev. 455, 472-473 (1962), states:

> "Whatever the effect of the *Hickman* doctrine on agents in general, there seems little justifica-

> tion for extending work product to cover expert information. The opinions and conclusions of an expert are not those which *Hickman* sought to protect. Unlike the attorney's impressions or those of the client or his investigators as to the value of certain evidence or the veracity of a potential witness, the opinions and conclusions of an expert constitute evidence in themselves, and may be the only way in which to establish facts material to the case. Indeed, the report of an expert to the attorney is sought for the very purpose of obtaining such facts and it can hardly be said that once in the hands of the attorney the information becomes 'protected conclusions' any more than does an eye-witness account by any other witness. The demoralizing aspects of discovery foreseen in the *Hickman* case are certainly not present when a deposition is taken, since the only danger is that the expert might trip himself should he change his testimony at the trial. It is apparent that in this respect the expert is no different from any other witness who has information relevant to the case."

Throughout its brief, the Government repeatedly states that it has not accepted or approved the work of the appraisers. On page 24 of its brief, the United States argues:

> "The United States has not approved or accepted, and does not vouch for, the opinions of the persons here examined or the reasoning by which their results were reached."

We respectfully submit that whether or not the United States has accepted or approved the work of the appraisers has absolutely no bearing whatsoever

on the discoverability of the appaisers' opinions and reports. Indeed, if the United States has not accepted the appraisers' reports, how can these reports be considered attorney's work product? In this connection, we note that none of the appraisers in the instant case were hired by Government counsel. All of them were hired by the National Park Service long before the United States filed its complaint in condemnation. Mr. Hopper's first appraisal of the Meyer property was on January 19, 1952, 14 years before the filing of the complaint in condemnation. His next appraisal was in August, 1962, 17 months before the filing of the complaint in the instant case. Similarly, the appraisals of Mr. Wilson and Mr. Sortor were made more than a year before the Government ever filed suit. Simply because these reports have been turned over to the United States Attorney does not make them privileged, nor does it mean that the opinions of the experts or their reports are non-discoverable. (*Hickman v. Taylor, supra; San Diego Professional Assn. v. Superior Court,* 58 Cal.2d 194 (1962); *S.F. Unified School Dist. v. Superior Court,* 55 Cal.2d 451, 457 (1961)

The Government argues:

> "It is not fair to prejudice the rights of a party—here the United States—by requiring such premature disclosure without an opportunity first to review and approve or disapprove the appraisers' processes. The initial report by an appraiser is simply a foundation upon which his testimony is based after thorough testing by the attorney and revision when necessary." (Appellant's Brief, p. 24)

How can the Government talk about "premature disclosure" in the instant case? It has had the appraisers' reports for years. The last report was rendered by Mr. Sortor in October, 1962, more than five years ago. Clearly, it has had ample time to evaluate the reports.

Moreover, we are frank to say that we are troubled by the implications which arise from the Government's apparent practice of revising the reports of its experts with which it is not satisfied. The Government states that the appraiser's report "is no more than an initial beginning from which his final testimony is fashioned in conjunction with the lawyer" (Appellant's Brief, p. 42) and that:

> "The result of these reviews is often a decision not to present the testimony of particular appraisers or, more frequently, revision of their reasoning, supplementation of data, and *possible change of opinion,* primarily because of the difference between federal condemnation principles and applied by many states." (Appellant's Brief, pp. 42-43) (emphasis ours)

These admissions by counsel demonstrate the urgency and necessity for full discovery of the experts' opinions and reports. They graphically illustrate how important discovery of the opinions, the facts underlying the opinions, and the reports themselves are to insure that the defendant is accorded full and complete due process of law. They bespeak a Departmental philosophy which we fear is akin to the recent disclosure of the use of illegal wiretapping by the Department of Justice. Along with the constant emphasis by the

Government of the landowner's burden of proof of evaluation without any mention whatsoever of the Government's duty to afford due process of law to the defendant whose property the Government seeks to condemn, they show an attitude of "victory at whatever the tactic" and a complete disregard of the rights of the individual.

We cannot believe that the appraisers employed by the Government are so incompetent that they require constant education by counsel. If the Government does not like the opinion given by its expert, it is free not to use that expert at trial; but certainly the landowner should be equally free to call the expert as his witness and produce the testimony that the Government does not wish to present. (See, e.g., *People ex rel. Dept. of Public Works v. Donovan,* 57 Cal.2d 346, 354 (1962)) If the expert's reasoning is faulty for some reason, the United States may cross-examine the witness and establish the faulty basis for the expert's opinion. In this manner, the lawsuit will truly be a search for truth, and the expert witness will become more than simply a paid "lackey" of counsel.

The Government next argues that discovery of the appraisers' procedures and mental processes in the making of the appraisal would annoy and embarrass the appraisers. This is ridiculous. How are appraisers different from any other kind of experts in this regard? If the appraiser's work has been inadequate, this should be subject to discovery and brought to

light in advance of trial. If the appraiser has failed to consider something which should have been considered, this should be open by way of discovery. The Government states that the comparable sales cited by the appraiser may not support the appraiser's result. If that is so, certainly it should be discoverable, so that both sides can properly evaluate and prepare their case for trial. Clearly, this will encourage settlements and increase the probability that the truth will be found at trial.

It is not true, as argued by the Government, that the only possible use that the defendant could make of the materials he has sought would be to discredit the appraisals or to secure the admission, by indirection, of evidence which is not admissible in federal condemnation trials. (Appellant's Brief, p. 41) The reasons for liberal discovery are well set forth in both the *Greyhound* decision of the California Supreme Court and *Hickman v. Taylor, supra.* They are numerous and range from ascertaining the evidence which will be presented at trial to enabling the attorney to more properly evaluate his case and possibly achieve a settlement for his client. This Court, in *Martin v. Reynolds Metal Corp.,* 297 F.2d 49 (9th Cir., 1961), in an opinion by Judge Duniway, stated:

> "One of the purposes of the Federal Rules of Civil Procedure was to take the sporting element out of litigation, partly by affording each party full access to evidence in the control of his opponent. To that end, Rule 34, like the other rules relating to discovery, is to be liberally construed. (citations)" (297 F.2d 49 at 56)

The Federal Rules of Civil Procedure, permitting the ordering of the taking of a deposition, do not require that inquiry at deposition be limited to evidence which would be material and admissible in evidence at trial. (*Martin v. Reynolds Metal Corp., supra*) The scope of examination on deposition includes inadmissible testimony reasonably calculated to lead to the discovery of admissible evidence. (Rule 26(b), Federal Rules of Civil Procedure; *Broadway & Ninety-Sixth St. Realty Co. v. Loew's Inc.,* 21 F. R. D. 347 (1958)) Nor does the mere fact that the matters inquired into in pre-trial examination are of general public knowledge or are within the knowledge of the examining party necessarily bar inquiry with regard thereto, since admissions as to those facts may serve to limit the area of dispute and may eliminate the necessity for introduction of evidence as to such facts at trial. (*Broadway & Ninety-Sixth St. Realty Co. v. Loew's Inc., supra*)

The Government also claims that discovery will delay and prolong trial. Considering the fact that the Government has delayed the instant case for more than two years through its refusal to comply with the District Court's order, we respectfully submit that the Government is hardly in any position to talk about delay. If the Government had followed the terms of the court's order and permitted the appraisers to testify at their depositions and turn over their records and reports, the case probably would have been brought to trial by this time and the matter concluded. Instead, the United States took an adamant

position in complete defiance of the court's order; and the District Court properly exercised its discretion under Rule 37(b) of the Federal Rules of Civil Procedure and dismissed the action.

Full discovery of the appraisers' opinions, the facts upon which they base their opinions and the appraisers' records and reports will not delay or prolong the trial of condemnation actions. Indeed, discovery has been shown to be an effective tool for avoiding trial by settlement and narrowing the areas of disagreement, so that if settlement cannot be obtained, trial time may be saved. If the Government's appraiser and the landowner's appraiser both agree as to the highest and best use of the condemned property, this can be stipulated to and trial time saved. If the appraisers agree as to water rights or mineral rights, trial time can be saved in that direction. If the appraisers agree concerning the use of certain sales as comparables, this can enable the court and counsel to save time at trial. If the appraisers can agree concerning any of the factors which make up the valuation of the property which is being condemned or the property which is remaining, this can be of assistance to the court. As the court stated in *United States v. 23.76 Acres of Land, etc.,* 32 F. R. D. 593 at 597 (1963):

> "As the government stresses in this case, the unfairness rule is to be determined by federal law, not by state law, yet the Court cannot disregard that, under Maryland law and in Maryland state courts, full discovery as to expert witnesses is permitted in condemnation cases, and

> the results have been that the issues are sharpened and pointed, trial time is reduced, and settlements are encouraged."

The Government claims that settlements and appraisals of other properties are not admissible in evidence and should, therefore, be non-discoverable; and, further, that the various notes made by the appraisers in the course of their investigations are remote from the issue in the case, as are "comparable sales rejected". (Appellant's Brief, p. 38) We strongly disagree. First, we again note that admissibility in evidence is not the test of whether or not a matter is discoverable. (Rule 26(b)) Settlements made by the Government in other condemnation cases may well shed light on the evaluation of the property in issue and certainly should be discoverable, regardless of whether or not they are admissible. The Government, of course, has this information and should not be permitted to deny the information to a landowner whose property it seeks to condemn. Likewise, the appraisal of the property next door, which the Government has obtained, may well show the Government's appraisal of the defendant's property to be inaccurate, erroneous or false. If the Government elects to shop around for "better appraisals", fire appraisers whose evaluations it does not like or gets the appraiser to modify or totally change his report, this should be brought to the light of day so that justice and due process can be secured. The Government should not ask the court to be a party to or to condone such practices.

The Government claims that "purely factual data" was not refused. We again disagree. Comparable sales are factual data. They are also discoverable. (*United States v. 3,595.98 Acres of Land, Etc.,* 212 F. Supp. 617 (1962); Rule 9(h) of the Rules of the United States District Court, Southern Division) Yet, none of the witnesses were permitted to list the comparable sales which they had used in evaluating the defendant's property. The United States wouldn't even permit Mr. Wilson to describe the nature and character of the condemned property at Big Meadow. (W. Dep. 44) It wouldn't permit him to give the dates when he was on the defendant's property or who accompanied him when he went there. (W. Dep. 39-40) It wouldn't permit him to state the dates of other appraisals that he had made with reference to the subject property or to state where the other property was located with reference to the Meyer property. (W. Dep. 27-28) It wouldn't permit him to state any of the parcels which he had taken into consideration in formulating his opinion of the value of the condemned property. (W. Dep. 44) It refused to permit him to state with whom he had consulted insofar as his evaluation of the property was concerned (W. Dep. 53-54) and wouldn't permit him to state what he had found out about the water rights on the defendant's property. (W. Dep. 50) The answers to these and many other questions seeking "purely factual data" were refused by the Government in complete defiance of the court's opinion and order.

The Government also raises the question of compensation of the appraisers. In view of its complete refusal to provide any meaningful discovery in this case, we question the propriety or sincerity of this argument. The United States was responsible for the failure of the experts to comply with the subpoenas which were served upon them and their refusal to answer the questions propounded to them in the depositions. Under Rule 37(f) of the Federal Rules of Civil Procedure, expenses and attorneys' fees may not be imposed upon the United States for failure to comply with the court's orders regarding discovery. But for that rule, the court probably would have granted monetary sanctions against the United States for its conduct in the instant case. It would seem completely fit and proper in view of the circumstances involved herein for the Government to be required to compensate the appraisers for their time in the abortive depositions.

Finally, the Government claims that good cause was not shown by the defendant in the instant case. First, it should be noted that the requirement of good cause is contained only in Rule 34 of the Federal Rules of Civil Procedure, which sets forth the requirements for obtaining documents and papers by means of a motion to produce. The requirement of "good cause" is not contained in Rule 26 of the Federal Rules of Civil Procedure, governing the scope of discovery in depositions. Good cause is not required for obtaining answers to questions propounded in depositions.

Moreover, as the court stated in *Henlopen Hotel Corp. v. Aetna Ins. Co.*, 33 F. R. D. 306 at 308 (1963):

> "Even assuming that some showing of good cause had to be made, the views of Chief Judge Wright in *United* support the conclusion that even a minimal showing should be sufficient unless persuasive reasons exist to the contrary. In my view, a minimal showing lies in the need to know and understand not only the facts, but also the theories and the method of approach upon which the adversary's experts rely.
>
> "Under such circumstances, at the very best, pre-trial examination may reveal such major defects in the reasoning and conclusions of the experts of one side or the other as to lead to settlement or, at the very least, enable counsel to prepare a searching and informative cross-examination for the purpose of laying bare the relative abilities of the various experts so that a jury of laymen can best weigh and assess the value of their testimony. 74 Harvard L. Rev. 940 (1038)."

We respectfully submit that sufficient good cause was shown for the obtaining of all of the appraisers' records and reports. Good cause was shown by the fact that from 1952-1962 at least three appraisers hired by the National Park Service have come onto the defendant's property on numerous occasions and have evaluated the property. Good cause was shown by the Government's concession that value is the sole issue in the case and that a determination of that issue would be made largely on the weight to be given the opinions of the experts. Good cause has been

shown by the Government's admission that it frequently gets its appraisers to revise and even change their opinions.

The Government also relies on Rule 71A(c) for its position herein. That is simply a rule of pleading and has no applicability to the question of discovery involved in the instant case. Simply because the plaintiff does not have to plead its claims of value does not mean that it may refuse to allow discovery of the opinions of its experts. Obviously, discovery extends beyond the narrow confines of the pleadings. Otherwise, where value is the only issue in the case as the plaintiff contends herein, there would be no discovery at all. Perhaps this is what the Government desires, but it is not and should not be the law.

The cases cited by appellant are not in keeping with the liberal approach to discovery set forth in *Hickman v. Taylor, supra.* Most of them rely heavily upon the case of *Lewis v. United Air Lines Transport Corp.,* 32 F. Supp. 21 (1940), which has also been cited by appellant herein. The *Lewis* case, which is generally considered to be the leading case denying discovery of the opinion of the adverse party's expert, was decided in 1940, long before the Supreme Court's landmark decision in *Hickman v. Taylor, supra.* The heart of the decision has been quoted on pages 54-55 of Appellant's Brief; and, we respectfully submit, demonstrates an acceptance of the "oath helper" approach to discovery, which is completely inconsistent with the aims and purposes of modern day discovery and the duty of the Government to afford

due process of law to the party whose land it seeks to condemn. The court's statement that "to permit parties to examine the expert witnesses of the other party in land condemnation and patent actions, where the evidence nearly all comes from expert witnesses, would cause confusion" is likewise unsound and incorrect. Where expert opinion concerning valuation of property is the heart of the case, it is essential that discovery of that opinion be allowed to avoid confusion, changing of reports, and possible perjury.

United States v. 7,534.04 Acres of Land, etc., 18 F. R. D. 146 (Georgia, 1954); *United States v. 6.82 Acres of Land, etc.,* 18 F. R. D. 195 (N. Mexico, 1955), and *United States v. Certain Acres of Land,* 18 F. R. D. 98 (Georgia, 1955), cited by appellant herein, all relied heavily upon the *Lewis* case without any real consideration of the part that discovery can and properly should play in the preparation of condemnation actions. *United States v. 900.57 Acres of Land, etc.,* 30 F. R. D. 512 (Arkansas, 1962), also cited by appellant, likewise denies discovery on what we respectfully believe is an artificial basis, namely that "this is the first instance in which a landowner has filed interrogatories or has sought to obtain appraisal reports". (30 F. R. D. 512 at 521) The court's comment that this "would be an innovation and greatly prolong the trial" is, we respectfully submit, unsound. Discovery expedites and facilitates both preparation and trial, encourages settlements, and narrows and defines the areas of agreement and disagreement. The investment in one or two (or in this case three) depositions is a minor expense com-

pared to the alternative—day after day of delay and confusion at trial while the attorneys attempt to combat the surprise which is inherent in the absence of discovery.

In *United States v. 284,392 Square Feet of Floor Space, Etc.,* 203 F. Supp. 75 (1962), cited by appellant, while the court did prohibit discovery of the expert's opinion, it did recognize that questions of fact are discoverable and that opinion and fact may be intertwined. Thus, the court stated:

> "It must be noted that even here areas of fact and opinion are intertwined. For example, 'modernity' of air conditioning involves both fact and opinion. However, a liberal approach must be adopted, lest any inquiry of fact fail because it in some peripheral manner touches on the area of 'opinion'." (203 F. Supp. 75 at 78)

In the instant case, the Government refused to permit the appraisers to testify concerning the facts forming the basis for their opinions.

Finally, appellant relies upon *United States v. Certain Parcels of Land,* 15 F. R. D. 224 (1954). In that case, the court denied discovery on the ground that the opinions were "incompetent and immaterial as evidence unless and until the appraisers are called as witnesses upon the trial" and qualified as experts. (15 F. R. D. 224 at 233) Such reasoning violates the express provision of Rule 26 of the Federal Rules of Civil Procedure, which permits discovery of incompetent evidence if it ". . . appears reasonably calculated to lead to the discovery of admissible evidence." We question whether the Government, which has hired the

appraisers and paid them with public funds, is in any position to claim that their chosen experts are unqualified. The decision in *United States v. Certain Parcels* certainly seems hyper-technical and clearly conflicts with the stated recognition by the court that:

> "In many cases a pre-trial exchange of the opinions of appraisers intended to be called by each side undoubtedly would tend to shorten cross-examination and otherwise expedite adjudication. (citation) Discovery of the reports in advance of trial in such cases would clearly be in furtherance of the declared policy of the rules 'to secure the just, speedy, and inexpensive determination of every action.' (citation)" (15 F.R.D. 224 at 233)

In *U. S. v. 50.34 Acres of Land,* 13 F. R. D. 19 (1952), the court permitted discovery of the Government's expert's appraisal reports under Rule 34. In granting the condemnee's motion for an order to permit him to inspect and copy two appraisal reports that were made for the Government prior to the institution of the condemnation action and at a time when the parties were negotiating for sale and purchase of the land, the court reasoned that as the reports were not privileged and as they were certainly relevant to the issue of just compensation, they should be produced. In commenting on this case, Professor Moore states:

> "Although as a general rule a party will not be allowed to obtain discovery from the adverse party's experts, a guarded relaxation of this doctrine in favor of the condemnee may, at times, be proper, at least in condemnation actions by the

Government. The condemnee is in the position of an innocent bystander who suddenly finds himself about to be dispossessed or already dispossessed merely because it has been determined by the government that his property is necessary for some governmental function. He may not recover his costs from the government. And the funds at his disposal in many (although not all) cases will be no match for those of the government. A desirable rule should be sufficiently flexible so that the district court may, on a showing of good cause and in the exercise of a sound discretion, permit discovery of expert appraisals and related materials that are non-privileged." (7 Moore, Federal Practice (2d ed., 1966), § 71 A. 20 [3], p. 2767)

In ordering discovery in the instant case, the District Court stated:

"I am of the view that full discovery of expert evaluation of land in eminent domain cases is fully consistent with the ideal of liberal construction of the Federal Rules expressed by the Supreme Court in *Hickman v. Taylor, supra.* To allow the participants to know what the other party intends to prove goes no further than the pleadings requirements of Rule 8, by which a party is required to state the relief to which he deems himself entitled. Where money value is the only question to be resolved (at least before a jury), it seems patently foolish to cling to wooden concepts of 'privilege' which more often than not obscure rather than illuminate. It goes without saying, however, that the allowance of discovery in these matters must cut both ways. The Government, as well as the condemnee, is entitled to know

what the other intends to prove." (38 F. R. D. 411 at 415)

We respectfully submit that this ruling of full and mutual discovery is sound and amply supported by reason and precedent. It is also supported by the local rules of the United States District Courts in California. (See Rule 4 (11) of the Rules of the United States District Court, Northern District of California, and Rules 9 (e) and 9 (h) of the Rules of the United States District Court, Southern District of California. See also Pre-Trial in Condemnation Cases: A New Approach, by Judge James M. Carter in Journal of the American Judicature Society, vol. 40, no. 3, p. 78 (1956)) The Government has chosen to deliberately and willfully violate the order of the District Court. It is attempting to preserve in secrecy, until the very date of trial, all information as to its valuation of the land being condemned. Sooner or later, however, the experts must speak. One can only question the motives of the Government in attempting to maintain secrecy until the date of trial. The only explanation is that the plaintiff feels it necessary to rely on the element of surprise and the tactical advantage which accompanies such surprise; but this is hardly in keeping with its role of serving as officers of the court and assuring that "just compensation" be determined.

We respectfully contend that pre-trial discovery of appraisers' opinions, the facts underlying their opinions, and their complete records and reports cannot help but lead to the preparation of more honest and reliable reports by both parties in condemnation pro-

ceedings. The pre-trial exchange of expert opinions and reports is not only justified but demanded by the Federal Rules of Civil Procedure, by the mandate of *Hickman v. Taylor, supra,* and by common sense. The Government seeks to establish a restrictive rule for condemnation discovery which would be procedurally medieval. The District Court properly ruled that the questions propounded to the appraisers and the appraisers' records and reports were proper matters of discovery; and that the United States had willfully refused to comply with the court's order. The action. was properly dismissed under Rules 37 (b) and 45 of the Federal Rules of Civil Procedure; and we respectfully submit that the judgment should be affirmed.

II. THE GOVERNMENT WILLFULLY REFUSED TO OBEY THE COURT'S ORDER REGARDING DISCOVERY IN THE INSTANT CASE. IT WILLFULLY AND WITHOUT SUBSTANTIAL JUSTIFICATION OR ADEQUATE EXCUSE CAUSED WITNESSES TO DISOBEY SUBPOENAS DUCES TECUM. THE DISTRICT COURT HAD THE POWER AND PROPERLY EXERCISED ITS DISCRETION IN DISMISSING THE ACTION AND SETTING ASIDE ITS ORDER FOR DELIVERY OF POSSESSION.

Despite the fact that the District Court had clearly ordered discovery of the experts' opinions, records, and reports and this Court had refused to permit an interlocutory appeal, the plaintiff chose to disobey the District Court's order and instructed the witnesses to refuse to answer the questions propounded to them at the depositions and to refuse to turn over their records and reports. The Assistant United States Attorney advised the District Court on the motion to

compel answers and to hold the witnesses in contempt that the witnesses would continue at the request of and the advice of the United States Attorney to decline to answer the questions. The action of the United States in refusing to comply with the District Court's order was a clear defiance of the order and in contempt of court.

Rule 37 (b) of the Federal Rules of Civil Procedure provides that if a party refuses to obey an order requiring him to answer designated questions or to produce any document or other thing for inspection, the court may strike the pleadings or parts thereof or dismiss the action or proceeding or any part thereof, or render a judgment by default against the disobedient party. Under Rule 37, dismissal for failure to comply is discretionary with the court. (*Craig v. Far West Engineering Co.,* 265 F.2d 251 (9th Cir., 1959), cert. den. 361 U. S. 816) To make pre-trial procedures effective, the District Courts must have full power to require complete discovery. (*Buffington v. Wood,* 351 F.2d 292 (3rd Cir., 1965)) The Federal Rules of Civil Procedure were designed to secure just, speedy, and inexpensive determination of every action; and a party may not ignore the plain mandate of these rules. (*United States v. Continental Cas. Co.,* 303 F.2d 91 (4th Cir., 1962)) The sanctions authorized by Rule 37 may be applied not only where there has been a wrongful intent to disobey the rule, but simply a conscious or intentional failure to act, as distinguished from accidental or involuntary noncompliance. (*United States v. Continental Cas. Co., supra)*

The Government is subject to the rules of discovery, just as any other litigant. (*Timken Roller Bearing Co. v. United States,* 38 F. R. D. 57, 65 (1964)) As was stated in *Shenker v. United States,* 25 F. R. D. 96 at 98 (1960):

> "There can be little dispute that the Government is not immune to this procedural process. Like any other party to a civil litigation the Government is bound by the same rules which apply to all other litigants including the Federal Rules of Civil Procedure and its discovery remedies."

The Government as a litigant does not have a greater right to secrecy than a private litigant. (*Conway Import Co. v. United States,* 40 F. R. D. 5 (1966))

In *United States v. Cotton Valley Operators Committee,* 9 F. R. D. 719 (1950), an action by the United States against various defendants for violation of the Sherman Anti-Trust Law, the District Court dismissed the action for the Government's failure to comply with the court's order to produce for inspection documents requested by the defendants. The action by the plaintiff in the case at bar was no less a willful disregard and refusal to comply with the District Court's order; and the action was properly dismissed under Rules 37 (b) and 41 (b) of the Federal Rules of Civil Procedure.

In *United States v. Certain Parcels of Land,* 15 F. R. D. 224 (1954), cited by appellant, the court stated:

> "As plaintiff the Government is subject not only to orders of the court under Rule 34, but

> also to the provisions of Rule 41 (b) that 'For failure of the plaintiff . . . to comply with these rules or any order of court, a defendant may move for dismissal of an action. . . . (citations)" (15 F. R. D. 224 at 232)

This was a condemnation proceeding and clearly indicates that the court may dismiss such an action where the Government fails to comply with the Federal Rules of Civil Procedure.

Appellant relies upon *United States v. Cobb,* 328 F.2d 115 (9th Cir., 1964). In that case, this court held that the District Court had no power to review the action of the Assistant Secretary of Agriculture, who made the estimate for the deposit made by the Government in connection with the filing of its declaration of taking. It is quite one thing to say that the court does not have the power to review an administrative decision made by the authorized administrative official, the Assistant Secretary of Agriculture. It is another matter to say that the court does not have the power to enforce its own rules, particularly when the Federal Rules of Civil Procedure clearly give the court the power to dismiss the action and the cases clearly hold that the Government is bound by these rules, just as any other party in civil litigation.

Rule 71 A(a) provides:

> "The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule."

Nothing contained in Rule 71 A(a) prescribes the power of the court to enforce its orders in condemnation cases through the powers granted by Rule 37 (b) of the Federal Rules of Civil Procedure. The United States is not and should not be above the law. The Government in the instant case has chosen to willfully disobey the order of the District Court. The District Court under Rules 37 (b), 41 (b) and Rule 45, governing the power of the court to punish a contempt, had the power and properly exercised its discretion in dismissing the action and the declaration of taking. The District Court had jurisdiction and, we respectfully submit, properly exercised its jurisdiction. The action of the District Court was fully justified; and we respectfully request that the judgment be affirmed.

CONCLUSION

The Fifth Amendment to the United States Constitution guarantees that no person shall be deprived of property without due process of law and, further, that private property will not be taken for public use without just compensation. The Government's disclosure that it frequently gets its appraisers to change their opinions and reports demonstrates the urgency for full and complete discovery in federal condemnation cases in order to ensure that "due process of law" and "just compensation" will not become hollow phrases. We can well understand why the officials, who are engaging in this shocking practice, wish to maintain a veil of secrecy around their appraisers in advance of trial; but this practice can-

not and should not be allowed to continue. The full light of discovery is needed, so the defendant, whose property is being taken by the Government will be afforded complete due process of law and be sure that he will receive "just compensation." Complete and mutual exchange of information through discovery is essential if the trial of a federal condemnation case is to truly be a search for truth, and justice is to be afforded for all.

For the reasons set forth above, we respectfully pray that the judgment be affirmed.

Dated, February 24, 1967.

Respectfully submitted,
C. Ray Robinson,
Bledsoe, Smith, Cathcart,
Johnson & Rogers,
Attorneys for Appellee
Horace Meyer.

Robert A. Seligson,
Of Counsel.

Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Robert A. Seligson.